

*United States Court of Appeals
for the Second Circuit*



**PETITIONER'S
REPLY BRIEF**

76-4267

United States Court of Appeals
FOR THE SECOND CIRCUIT

GENERAL DYNAMICS CORPORATION,

Petitioner,

—against—

JUDITH ANN WEBER,

—and—

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Respondents

ON PETITION TO REVIEW ORDER OF BENEFITS REVIEW BOARD,
UNITED STATES DEPARTMENT OF LABOR, BRB NO. 76-129

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner's main brief makes just four points, which respondents attempt to bury under an avalanche of re-stated hornbook law. Those four points are:

I

To affirm, the Court must agree that the rationale of the ALJ and BRB decisions is clear, valid, and sufficient. Although respondents do not contest this point, respondent Weber endeavors to supplement the ALJ's finding that "devastating stress" precipitated decedent's death by citing a string of physical exertion cases and suggesting that McColl's Hotel or Scottish weather may have been special

danger zones. "After the fact rationalization by counsel in brief and argument does not cure non-compliance by the agency with the stated principles." *duPont de Nemours & Co. v. Train*, 541 F. 2d 1018, 1026 (4 Cir. 1976).

II

Employee death at a Defense Base Act situs is not *per se* compensable; death must also arise out of the employment which, as cases quoted by the ALJ hold (6a-7a), means death "by reason of a risk incidental to the location where the employment requires him to be". There is no evidence of any risk at McColl's on decedent's Sunday off, and the ALJ did not attribute death to such non-existent risk. "The mere fact that the [death] is contemporaneous or coincident with the employment is not sufficient basis for an award. * * * To hold that there was a causal connection between the [death] and the employment would be to indulge in conjecture." *Ayers v. Hoage*, 63 F. 2d 364, 365-366 (D. C. Cir. 1933).

III

"Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. 'It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion'", *Labor Board v. Columbian Co.*, 306 U.S. 292, 300 (1929). There is no substantial or even scintilla evidence that decedent was under "devastating stress" at McColl's the day he died, or that any previous stress did or even might cause a fatal myocardial infarction on his day off. Respondents beg this point by reciting decedent's real or supposed prior stresses, and expanding the ALJ's inference-making authority to impermissible speculation

by arguing that he could infer cause from medical testimony of no cause. Except in one distinguishable case, *Crescent Wharf & Warehouse Co. v. Cyr*, 200 F. 2d 633 (9 Cir. 1952), there was a specific affirmative M.D. opinion of at least "could have" causation in every heart attack case cited by the ALJ and respondents. *Harbor Marine Contracting Co. v. Lowe*, 152 F. 2d 845, 846 (2 Cir. 1945), cert. den. 328 U.S. 837 (1946); *John W. McGrath Corp. v. Hughes*, 264 F. 2d 314, 316 (2 Cir. 1959), cert. den. 360 U.S. 931 (1959); *Sentilles v. Inter-Caribbean Corp.*, 361 U.S. 107, 109, 110 (1959); *Todd Shipyards Corp. v. Donovan*, 300 F. 2d 741, 743, 744 (5 Cir. 1962); *Wheatley v. Adler*, 407 F. 2d 307, 310 (D.C. Cir. 1968). In *Crescent Wharf*, *supra*, although the only M.D. opinion on causation was negative, 200 F. 2d, p. 636, the decedent had a heart attack and collapsed while "very vigorously tugging on a rope" in an effort to dislodge a jammed beam, *ibid.*, and the Court held it permissible to infer that "unusual effort" precipitated the attack, 200 F. 2d, p. 637, because, as stated in *Todd Shipyards*, *supra*, "the occurrence of [a] heart attack immediately following strenuous activities in itself raises an inference of a causal relationship between the activities and the attack", 300 F. 2d, p. 742. Decedent Weber's myocardial infarction did not occur during or immediately following any strenuous activities; it occurred at McColl's while he was leisurely enjoying his day off.

IV

Despite the ALJ's disbelief, the opinions of the attending physician ("I do not think that Mr. Weber's working conditions contributed to his death and he was certainly comfortably housed at McColl's Hotel." Ex. M) and of

petitioner's medical expert (" * * * this man's acute myocardial infarction of Sunday, September 15, 1974, resulted solely from the natural, spontaneous and inevitable progression of underlying coronary artery heart disease, a non-industrial disease process, unrelated to his work activities * * *." Ex. 2) negate the § 20(a) presumption of compensability, which no longer has "the quality of independent affirmative evidence". *John W. McGrath Corp. v. Hughes, supra*, 264 F. 2d, p. 317; *Travelers Insurance Co. v. Belair*, 412 F. 2d 297, 301, fn. 6 (1 Cir. 1969). Respondent Weber urges that because those doctors did not know about decedent's prior stresses, their opinions are not substantial evidence to off-set the presumption. But the treating physician's on-the-scene knowledge was certainly sufficient to allow a reasonable mind to accept his opinion as adequate basis for determining no causal relationship, and both opinions are well above the level of "hypothetical probabilities" depreciated in *Steele v. Adler*, 269 F. Supp. 376, 379 (D.C., D. of C. 1967), and the wishy-washy testimony held insubstantial in *Butler v. District Parking Management Co.*, 363 F. 2d 682, 683, 684 (D.C. Cir. 1966), and *Wheatley v. Adler, supra*, 407 F. 2d, pp. 312-313.

Perhaps it might be successfully urged that job activity damaged an employee's heart so as to cause a compensable myocardial infarction the next day while he was resting in a Defense Base Act hotel. But specific medical testimony of causation would be necessary for the required substantial evidence that the infarction arose out of the employment. Here, there is no such testimony. All claimant Weber introduced is Dr. Spitz' letter (54a) summariz-

ing his general thoughts about stress and coronary artery disease, without particular reference to decedent on his day off at McColl's.

Conclusion

The Board's decision should be reversed and the claim remanded for further ALJ hearing.

Respectfully submitted,

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BURLINGHAM UNDERWOOD & LORD
Attorneys for Petitioner

WILLIAM M. KIMBALL

EDWARD J. MURPHY

of Counsel

March 29, 1977

SIR :

Please take notice that the within
will be presented for settlement and sig-
nature at the office of the Clerk of this
Court at

on the day of
19 , at o'clock M.

Dated 19

BURLINGHAM UNDERWOOD & LORD
for

One Battery Park Plaza
New York, N. Y. 10004

To

for

SIR :

Please take notice that the within is
a copy of
this day duly filed and entered herein in
the office of the Clerk of this Court.

Dated 19

BURLINGHAM UNDERWOOD & LORD
for

One Battery Park Plaza
New York, N. Y. 10004

To

for

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Petitioner,

- against -

JUDITH ANN WEBER and DIRECTOR,
OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPART-
MENT OF LABOR,

Respondents.

F.R.App.P. 25(1)
Certificate of
Service

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK
COUNTY OF NEW YORK

} S.S.:

, being duly sworn, deposes and says that
he is a clerk in the office of Burlingham Underwood & Lord,
for
herein; that on the day of , 19 , he served the within
securely enclosed in a postpaid wrapper, in the post-office box regularly maintained by the United States
Government at One Battery Park Plaza in said County of New York to each of the following:

The address of each of the above is the address designated by each of them for that purpose upon
preceding papers in this action, or the place where each then kept an office.

Sworn to before me this
day of , 19 .

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

X

GENERAL DYNAMICS CORPORATION, :
Petitioner, : 76-4267

- against - : F.R.App.P. 25(d)
: Certificate of
: Service

JUDITH ANN WEBER and DIRECTOR,
OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT
OF LABOR, :
Respondents. :
: X

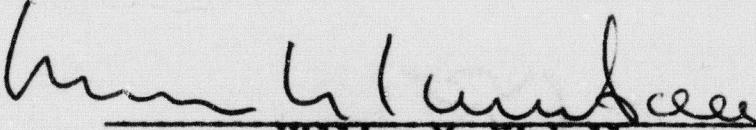
I certify that on March 29, 1977, I caused 3 copies,
each, of petitioner's reply brief to be served by first class
mail on respondents' attorneys of record herein, addressed as
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